Supreme Court, U.S.
FILED
NOV 2 3 2004
OFFICE OF THE CLERK

(3)

No. 04-421

IN THE

Supreme Court of the United States

CLUB CAR (QUEBEC) IMPORT, INC.,
MARTIN MURPHY, PETITIONERS

v.

CLUB CAR, INC.,

AND

PIERRE CHAMPIGNY, EQUIPMENTS PIERRE CHAMPIGNY, LTD.,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

STEPHEN F. HUMPHREYS
Attorney for Petitioners
STEPHEN F. HUMPHREYS, P.C.
191 E. Broad Street,
Suite 305
Athens, Georgia 30601
(706) 546-8892

SAM G. NICHOLSON
Counsel of Record
NICHOLSON REVELL LLP
4 George C. Wilson Court,
Suite A
Augusta, Georgia 30909
(706) 722-8784

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

IRRELEVANT FACTORS 3

AFTER THE FACT AUTHORITY 5

EX PARTE ARGUMENT 7

CONCLUSION 8

SUPPLEMENTAL APPENDIX

TRANSCRIPT EXCERPTS (02/13/03) 150a

TRANSCRIPT EXCERPTS (03/12/03) 157a

TABLE OF AUTHORITIES

Page

CASES

BAZEMORE V. FRIDAY, 478 U.S. 285 (1986) 6

SHAW V. RUIZ, 207 GA. APP. 299, 428 S.E.2D 98 (1993) 5

Respondents' Briefs in Opposition provide ample evidence why *Daubert* determinations must not be allowed to become an exercise in hide the ball by the attorneys or snap decisions by the trial court. Respondents try to draw the eye of this Court to every irrelevant consideration, up to and including the time the mailman postmarked their service copies. They distort the facts, characterizing this as a routine collections case, for example, conveniently overlooking the fact that the jury found against Club Car on CCQ's counterclaims for breach of contract, promissory estoppel, unpaid commissions, and breach of fiduciary duty. However, the jury was unable to award significant damages because virtually all the damages evidence was excluded after an abbreviated and chaotic hearing on a motion first raised after the close of evidence.

Respondents also argued in their briefs that there was no harm in the deficient proceedings because the trial court did not strike the entire testimony of CCQ's expert, Peter Ryan, though they argued forcefully for exactly that during all five minutes of the Daubert hearing, and the court obliged, pronouncing the witness completely excluded. See Petition, p. 7 & App. 137a. Respondents reverse course on appeal, realizing that there is no basis whatsoever in the record for excluding, for failure to discount to present value, CCQ's past damages, or for excluding, for failure to deduct expenses, damages based on reduced margins, promissory estoppel, unpaid commissions, or breach of fiduciary duty. They invoke instead another post-trial rationale, the supposed failure to follow generally accepted accounting principles, though no evidence was offered at trial on this subject.

The trial court and the Eleventh Circuit failed to uphold the trust placed in them by *Daubert*--by presiding over and allowing such a confused and illogical proceeding, and allowing such rationales to be advanced post-trial, after the witness had already been excluded.

While Respondents also seek to draw even this Court into irrelevant and distorted factual inquiries on appeal, Respondents never give a single reason for letting the motion in limine deadline pass without making their objections known. They do not allege they were not aware of the expert's methodology, after deposing him twice. In fact, their arguments that the deficiency of his method was so obvious merely beg the questions: Why did Respondents not file a timely motion in limine? Why could they not find an opposing expert to dispute the methodology of CCQ's expert? The only reason, which Respondents cannot deny, is to substitute ambush value for a full airing of the issues.

What has occurred instead of the careful review and creation of a record that should precede a Daubert decision is that the courts below have undertaken an after-the-fact revision, in which all the argument and authority, inapposite as it is, was supplied after the ruling was already reached. This reverse-order justice, in which the conclusions precede the analysis, turns this Court's decisions in *Daubert* and its progeny on their heads, as what is supposed to be a careful and reasoned analysis to determine the reliability of evidence is itself turned into a process without reliability or credibility.

Thus Respondents' attempts to argue that there is no important federal issue here, only a little collections case in Augusta, Georgia, are highly deceptive. *Daubert* has been gutted in this trial, and this evisceration has been blessed by the Eleventh

Circuit. The federal court system can ill afford to let Daubert proceedings jump the track into anarchy, as the Eleventh Circuit has done in this case, and this Court must draw admissibility determinations back within the ample and flexible bounds set by *Daubert*.

Irrrelevant Factors

Respondents argue that, despite the amendment of its claims, CCQ was asking for future damages at trial. See Petition, p. 4. Because CCQ originally had claims for future damages, which were dropped immediately prior to trial, CCQ expert Peter Ryan dealt with these claims in his preliminary expert reports—which were preliminary because Respondents had not produced the invoices from which damages were being determined. Since these future damages claims were dropped with the court's approval in the pre-trial conference, CCQ sought to subtract those numbers from Ryan's damages estimates at trial. Trial Transcript, Vol. IV, App. 151-156a. Respondents and the court insisted, however, that Ryan present his report as originally written, without revising his presentation to eliminate claims no longer in the case. Id. Yet those are the very future damages claims which, according to the court, were not discounted for present value, from which expenses were supposedly not deducted, and on which Respondents very Daubert objection hinges. Thus it is yet another example of the ways in which Respondents and the court below drew the inquiry away from the relevant issues. Respondents still seek to confuse those issues today, and confusion should not be the hallmark of a Daubert proceeding.

The fact that there is still an argument about what claims are in the case demonstrates quite effectively how little analysis preceded the court's

ruling. Trial courts should at least be required to match the grounds for excluding evidence with the corresponding issues and claims. That did not occur prior to the exclusion, in his entirety, of CCQ's expert.

At trial, the court based its ruling solely on a failure to deduct expenses. It paid no attention to Ryan's **unrebutted** testimony that the sales lost through Club Car's breach of contract would not have added significantly to CCQ's expenses. See Petition, p. 14 & n.18.[1] It paid no attention to the fact that expense deductions have no bearing on several categories of damages excluded on that basis, such as reduced margin damages. The courts below and Respondents completely ignore this context with all their out-of-context citations to Ryan's gross margin testimony.

As part of its after-the-fact clean-up, the trial court mentioned for the first time Ryan's failure to follow generally accepted accounting procedures. Respondents now rely on the Eleventh Circuit seizing on this rationale to uphold the exclusion. However, there was no evidence whatsoever at trial as to what those accepted procedures were or how Ryan supposedly violated them—by failing to deduct expenses that he testified, without opposition, did not apply. Club Car's own expert did not challenge Ryan's accounting methodology, and was not called to testify at trial.

Daubert, on the other hand, must be about placing the evidence in context, not about taking it out

---

[1] Respondents argue that this testimony was not directed precisely at the substance of their motion. That is because they did not make their motion based on the accounting methodology until after the witness was excused. This only reinforces the necessity of giving appropriate prior notice and bringing on a timely basis Daubert objections that are known and planned in advance.

of context, considering evidence that was never presented—or even substituting the "common sense" of the court for evidence and testimony. App. 160-161a. Such sheer fabrication of a rationale without a record must be called an abuse of discretion and a breach of *Daubert's* requirements.

After the Fact Authority

Respondents now argue *Shaw v. Ruiz*, 207 Ga. App. 299, 428 S.E.2d 98 (1993) as proper grounds for the "common sense" exclusion of CCQ's expert. This is the only legal authority ever offered to justify the exclusion, though it was never cited, briefed, or argued prior to the exclusion of CCQ's expert. Respondents and the courts below, however, all cite as conclusive the proposition from *Shaw* that damages equal lost profits minus expenses. Nowhere is there any mention of the fact that this language in *Shaw* relates to claims for lost future "anticipated damages," which were not in issue in the instant case. 428 S.E.2d at 102. In *Shaw*, these future damages were excluded because there were no past sales from which to extrapolate future damages. *Id.* The expenses referred to in the dicta of *Shaw* were not even at issue because—unlike the instant case, in which CCQ's expert gave unrebutted testimony that increased sales in the ongoing enterprise would not have created additional overhead expense—it was admitted in *Shaw* that all but $10,000 of the $79,000 claimed in lost future profits would have been eaten up by expenses. *Id.*

Does *Shaw* even apply to the facts and issues in the instant case? That is arguable. CCQ would have argued that it did not. Clearly, however, the time to argue this authority would have been at the time of the Daubert hearing, not on appeal, and not to the U.S. Supreme Court. The seminal point is, rather, that this

authority was never raised, briefed or argued prior to the exclusion of CCQ's expert. *Shaw* was first cited by the court on post trial motions to justify what had already been decided. It was not proper for the Eleventh Circuit to uphold this unexamined, post facto authority as conclusive.

If allowed, this practice of supplying the legal authority after the fact, without allowing the parties to argue whether it applies to the facts and issues in the instant case, effectively destroys *Daubert*. Daubert procedures were so deficient here that no legal authority whatsoever was offered for exclusion of the witness in advance of the ruling.

Respondents also engage in lengthy argument that this Court's ruling in *Bazemore v. Friday*,[2] that failure include a single cost variable goes to credibility, not admissibility, does not apply to the facts of this case.[3] Again, the fact that this argument is occurring now, in briefs to the Supreme Court, almost two years later, and never occurred prior to the exclusion of the witness, is a clear indication that the trial court never fulfilled its responsibility to air these issues before making a ruling under *Daubert*.

That is a sure sign that the requirements of *Daubert* have not been followed, when all authority and factors are raised in retrospect to justify a snap judgment already made, based on a motion withheld until the last day of trial for the very purpose of confusing the issues and prejudicing CCQ. The Eleventh Circuit must be reversed for stating that a proper Daubert analysis does not require more care and

---

[2] 478 U.S. 285 (1986).

[3] *Id.* at 400.

exactitude by the court or professionalism by the attorneys.

Ex parte Argument

Respondents' counsel explains the attempt, without CCQ's knowledge, to impart legal argument to the court, by saying that copies of the document supporting the argument were left on CCQ's counsel table and given to the clerk of the court. As no one remembers seeing either of those copies and they have never been located, CCQ cannot say how that document and the argument it purported to support were transmitted to the court. App. 158a (document not in court record and clerk has no recollection of it).

This Court is not the place to engage in such a factual inquiry. What is clear, however, is that until the time Respondents' counsel made the oral argument for exclusion, CCQ had no prior notice either of the document or the argument previously transmitted to the court for excluding CCQ's expert for failure to deduct unspecified costs from his damages calculations. The court then ruled to exclude CCQ's expert before there was any opportunity to challenge that argument, consider the document, offer competing authority, or explore any of the ramifications of the very general proposition on which Respondents and the court relied. That is how past damages came to be excluded for failure to "discount them to present value."

Again, this cannot be the way a Daubert hearing is conducted, based on tardy motions and phantom submissions, with no actual prior notice to the other party. Basic standards of notice and fairness must apply. This case shows how the analysis suffers when they do not, as relevant factors are not considered, and irrelevant factors are substituted.

The Eleventh Circuit dismissed these concerns, overlooking the problem of "legal argument" being offered to the court before the other side even has notice of a challenge to the expert's methodology--so long as "evidence" is not being offered to the court on an ex parte basis. See Petition, pp. 16-17 & App. 6a. This Court should reverse the Eleventh Circuit on this point to make it clear that a higher standard of professionalism is required in a Daubert hearing, or any other phase of litigation.

Perhaps a more important consideration, for purposes of upholding the integrity of *Daubert*, is that the court excluded CCQ's expert evidence in its entirety within minutes of the disclosure of the document transmitted to the court and the objection it was offered to support. This was the first mention ever of any objection to the accounting methodology used by CCQ's expert. Respondents and the courts below maintain that some lengthy deliberative process followed this surprise development. The record speaks for itself that it did not, however, and this Court must re-draw the line to emphasize that the brief and chaotic developments in the trial of this case, sprung without any legitimate prior notice, do not satisfy *Daubert*. See Petition, p. 10 & App. 6a, 125-137a.

Conclusion

Under Respondents' theory, the discretion of the trial court is unlimited and cannot be abused. A five-minute discussion after the judge has already made up his mind and allows no further argument can be termed a "lengthy discussion" and thereby satisfy *Daubert*. Daubert objections may be planned in advance and sprung in ambush at the last minute.

This case provides a perfect example of the chaos this approach will cause. Almost two years after the

trial, exactly what was excluded, and upon what basis, is still debated. Accounting rationales and legal authority, which were never raised or argued before the decision to exclude, have been supplied after the fact.

Failure to discount to present value is one rationale offered, though it does not apply to past damages evidence that was excluded, and no future damages were argued to the jury. Failure to follow generally accepted accounting procedures is another post facto rationale, though this term was never used prior to exclusion, and no evidence was offered on this subject, including from Respondents' own expert accounting witness.

This failure to follow accepted accounting procedures purportedly rests on the failure to deduct expenses, though the undeducted expenses have never been identified. Expense deductions, furthermore, clearly do not apply to some categories of damages excluded. The unrebutted evidence is that there were no expenses to deduct. The only case law authority offered on this point was a future damages case, and was never cited, briefed, or argued prior to the exclusion of CCQ's expert.

This confusion is, in part, predictable given the tardiness of Respondents' motion to exclude based on faulty methodology. Yet Club Car cannot say why it waited till the last day of trial to make this motion. Nor can it say why, if the issue was so clear, it could not just follow proper, professional procedure and file a timely motion in limine.

The Eleventh Circuit has allowed Respondents and the trial court to make up after-the-fact explanations and justifications and confuse the issues after trial instead of clarifying the issues prior to a

ruling on admissibility. If that is not an abuse of discretion, then there can be no abuse of discretion under *Daubert*, and the purported procedure for ensuring the reliability of expert testimony is itself rendered completely unreliable. Instead, the order of the day will be surprise last-minute motions, adverse rulings without an airing of the issues, and after-the-fact application of factors which do not even relate to the issues in the case and authorities which were never raised or argued prior to exclusion of the expert.

To avoid that result, now is the time for this Court to follow the Tenth Circuit's suggestion and set a level of professionalism, competence, and reliability that will restore and maintain confidence in determinations of expert admissibility in the federal court system. See Petition, pp. 20-21. It can do that without altering the flexibility inherent in *Daubert* by simply requiring that the factors on which admission or exclusion is based meticulously match the facts and issues in the case, that a good faith attempt be made to examine the issues, that adequate notice and an opportunity to respond be given to all sides, and that a record be created with specific findings. None of that occurred in this case. In addition, this Court can require a justification for making a Daubert objection after missing a motion in limine deadline. No less is required to uphold the rulings of this Court under *Daubert* and to ensure the accuracy and reliability of expert witness admissibility determinations in federal court.

Respectfully submitted,

SAM G. NICHOLSON
4 George C. Wilson Court, Suite A
Augusta, Georgia 30909

No.CV100-195

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

CLUB CAR, INC.,
Plaintiff,

vs.

CLUB CAR (QUEBEC) IMPORT INC.
and MARTIN MURPHY,
Defendants.

***

CLUB CAR (QUEBEC) IMPORT, INC.
Counterclaim Plaintiff,

vs.

CLUB CAR, INC.; PIERRE CHAMPIGNY;
EQUIPEMENTS PIERRE CHAMFIGNY, LTD. and
INGERSOLL-RAND CO., LTD., :
Counterclaim Defendants.

Augusta, Georgia

February 13, 2003

VOLUME 4
TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE
ANTHONY A. ALAIMO

Reported By: Norma Hatfield
Official Court Reporter
801 Gloucester Street, Rm. 216
Post Office Box 1316
Brunswick, Georgia 31521—1316
(912) 262—9989
FAX (912) 262—9100
normah@thebest.net

***

The total damages identified in my report at that date are $10,464,176.

Q Okay. Now since that time, have you revised those numbers based on the claims that exist today?

A Some of the damages that I have identified I believe have not been presented as claims in this court. But by and large, those claims which have been presented reflect the numbers in this court.

Q And have -- since some of the claims have not been, are there revised numbers within that framework of the numbers that you provided earlier?

A There may be minor changes in terms of the number of units or variations of percentage or average selling price, something like that.

Q Let's talk about some of the specific numbers.

MR. PENN: Bob, if you will put up the damages.

BY MR. PENN:

Q Let's talk about how you arrived at these numbers. One portion is the calculation of damages for the sale of free new parts. And can you see that, by the way?

A Yes, I can.

Q If you want a copy --

MR. PENN: Your Honor, may I approach?

THE COURT: Yes.

MR. PENN: Thank you.

BY MR. PENN:

Q Under (A), what is this calculation right here?

A During the course of reviewing the documents which were produced, it was discovered that Club Car had been -- Club Car, Inc. -- had been shipping parts packages to Mr. Champigny with his cars. That information came -- what I did was -- Mr. Champigny produced his Customs documents. After a considerable period of time and considerable reduction in the number of documents due to duplication, I prepared a summary.

MR. ELLINGTON: Your Honor, I hate to object, but I'm going to object here because the testimony we're seeing now is brand-new testimony outside of the scope of his expert report. These type of calculations have not been presented here before.

MR. PENN: Actually, it comes right out of his report.

MR. PURCELL: I'm going to object, too, because I have a document that's got a different number on it.

THE COURT: You can cross-examine him on that.

MR. PURCELL: I understood the Court to limit the witness to his report.

THE COURT: Yes, yes.

Point out in the report what you're questioning him about, where in the exhibit it is.

BY MR. PENN:

Q Where does this --

THE COURT: No, no. My question is: Where in the report he filed, where is it?

MR. PENN: Right. That is my question to Mr. Ryan.

THE COURT: All right.

BY MR. PENN:

Q Mr. Ryan, where does this section (A) come from in your report?

A Section (A) refers to, under my summary and conclusions, item two, Damages on Parts Packages.

Q What is the number on your report?

A The number on my report is $921,435.

Q All right. And the number here is a little higher. Can you give an explanation as to why, what is the difference?

MR. PURCELL: Judge, he --

THE COURT: He cannot testify to that. He is limited to this.

MR. PENN: Okay. Thank you, Your Honor.

MR. PURCELL: And we would object to the screen showing the jurors numbers other than what is on the report, Judge.

MR. ELLINGTON: I have the same objection.

THE COURT: I will sustain the objection.

MR. PENN: May I consult with co-counsel for a second?

THE COURT: Certainly.

(Pause)

BY MR. PENN:

Q Mr. Ryan, the numbers that were on the screen, the total numbers for everything that is in that demonstrative exhibit, are they higher or are they lower than the numbers in your report?

A I would say for all intents and purposes, they are virtually identical. There are minor differences, certainly.

Q You just gave us a total --

THE COURT: Go on to your next question.

MR. PENN: I don't think he understood my question, Your Honor.

THE COURT: Did you understand his question?

THE WITNESS: I'm not sure I did, Your Honor.

THE COURT: All right. Go ahead. Restate the question.

BY MR. PENN:

Q Give us again, what is the total number that was on your report?

A The total number on my report was $10,464,176.

Q And what was the total number for the revised number that came out of your report?

A The total number, based on an extrapolation of my report ranged from $5,395,994 to $5,870,936.

Q So the revised numbers that are based on your report are lower than the numbers that were in your report?

A Yes, they are.

MR. PENN: Your Honor --

THE COURT: Generally speaking, his testimony is to what he filed in this Court, or rather the opinion that you filed in this Court.

BY MR. PENN:

Q Okay. Let's go back to your report, Mr. Ryan, and let's talk about the first conclusion. What was the number again? What was the conclusion and what was the number?

A The conclusion was that the damages on lost sales of one year old cars for the period 1997 to 2000 was $821,813.

Q All right. And that was for the loss of new sales?

A That would have been the gross margin on the sale of one year old cars for that period of time.

Q Okay. And how did you arrive at that calculation?

No.CV100-195

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

CLUB CAR, INC.,
Plaintiff,

vs.

CLUB CAR (QUEBEC) IMPORT INC.
and MARTIN MURPHY,
Defendants.

***

CLUB CAR (QUEBEC) IMPORT, INC.
Counterclaim Plaintiff,

vs.

CLUB CAR, INC.; PIERRE CHAMPIGNY;
EQUIPEMENTS PIERRE CHAMFIGNY, LTD. and
INGERSOLL-RAND CO., LTD.,:
Counterclaim Defendants.

Brunswick, Georgia

March 12, 2003

HEARING ON ATTORNEYS' FEES
BEFORE THE HONORABLE
ANTHONY A. ALAIMO
United States District Judge

Reported By: Norma Hatfield
Official Court Reporter
801 Gloucester Street, Rm. 216
Post Office Box 1316
Brunswick, Georgia 31521—1316
(912) 262—9989
FAX (912) 262—9100
normah@thebest.net

***

any other counsel or party, other than perhaps "good morning" or some other pleasantry.

Further, Mr. Harris incorrectly assumes that this document is the only basis upon which the Court could have ruled as it did. That's absurd. This Court has been on the bench since 1971 and has heard damage cases of all sorts since that time and can use its common sense and doesn't even have to rely on a document such as the one I put on Mr. Rowe's table.

THE COURT: Mr. Rowe, was that ever submitted to the Court?

THE CLERK: Judge, I just don't remember. There were so many documents, I don't recall it.

THE COURT: All right. In any event, is there any dispute that it was laid on your table?

MR. HARRIS: I never saw it. I just want to briefly respond.

THE COURT: Do you dispute it?

MR. HARRIS: I never saw the document.

THE COURT: Maybe not. Nevertheless, if he put it on the table --

MR. HARRIS: It Mr. Purcell says he laid it on the table, I'm not going to stand here and argue with that, that he laid it on the table, because I believe what he said. THE COURT: When you claim in a brief that there has been an ex parte communication with the Court, it ought to be pretty clear; should it not?

MR. HARRIS: Well, Your Honor, I think it was clear because Mr. Purcell submitted to the Clerk of Court a document. And then he took it -- and let's think about what the document was. It was a mimeographed page from a book on damages. Assuming, for the sake of argument -- and I believe him that he put it on our table -- it's meaningless. It's not any kind of pleading during the middle of trial that --

THE COURT: It bears on the question of whether it was ex parte.

MR. HARRIS: I think it -- Your Honor, ex parte simply -- he submits something that we don't have the opportunity to respond to because we don't know about it. And that's exactly what happened.

THE COURT: Nevertheless, if it is submitted to you and you did not see it or did not look at it --

MR. HARRIS: I would dispute the fact that if you put a mimeographed piece of paper on someone's desk at trial and don't tell him about it, that that's

submitting it to him. Clearly, Your Honor, I would never submit a document to Mr. Purcell and expect him to read it by sticking it on the table in the middle of trial without any indication that it was a pleading or something that had been served on the Court. I just think that's improper.

THE COURT: I think it is improper to make that contention unless you are pretty clear on it.

MR. HARRIS: Well, Your Honor, all we know is from the record that Mr. Purcell says he submitted a document for the Court's consideration that we weren't aware of. I think we can stand by that position.

As to whether or not the Court read it or not, I can't --

THE COURT: Or even saw it.

MR. HARRIS: Or even saw it. I'm not contending that the Court did. But I do know --

THE COURT: Now let me ask you this: Was that put up on the screen?

MR. HARRIS: No, Your Honor. It was a page -- it was a damages -- apparently, it was page from a damages textbook.

But there is one other point I want to respond to. And his point was that the Court could rule based on its common sense about this testimony. And I respectfully disagree with that. What they were making was a Daubert motion. They were saying that this man's

testimony did not have -- actually more correctly, Kumo Tire did not have a scientific basis for its admissibility. That's precisely what they were doing.

I respectfully don't think that courts can rule based on their common sense about technical evidence. The way it's supposed to work is you have some other expert come in and say, "That man's testimony doesn't comport with what accountants in the field do." Or you submit documents --

THE COURT: Are you saying that I could not come to a conclusion when the witness said he did not take into consideration expenses when he says what damages are, that I cannot, just as a matter of common sense, without being an expert or anything else, conclude that his opinion is valueless?

MR. HARRIS: Well, Your Honor, we're getting into the notion for new trial, which I'll be glad to talk about. But the problem with it was this: There were two elements of damages. There was a $5 million claim for lost future profits that wasn't even in the case. And the reason it wasn't in the case is because the Court had made a series of rulings up until the week before trial along the lines of, "You cannot maintain those claims."

So we were doing precisely what we had to do, and that was withdrawing certain claims from the jury's consideration. The $5 million that the cost or expenses was not purported deducted from wasn't even in the case. The $5 million that was in the case was simply Mr. Ryan taking invoices and calculating goods that had already been sold